

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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CAPSTONE EQUITY LLC,	:	
	:	
Plaintiff,	:	12 Civ. 4214 (KPF) (HBP)
	:	
-against-	:	REPORT AND
	:	<u>RECOMMENDATION</u>
	:	
CPS GROUP INC., a New	:	
York Corporation doing	:	
business as "Cynergy	:	
Data," <u>et al.</u> ,	:	
Defendants.	:	

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PITMAN, United States Magistrate Judge:

TO THE HONORABLE KATHERINE POLK FAILLA, United States  
District Judge,

Plaintiff, which was then represented by counsel,  
commenced this breach of contract action on May 25, 2012. On  
April 2, 2013, I granted the application of plaintiff's former  
counsel to withdraw from the case on the ground that he had not  
been paid by plaintiff. My endorsement granting the motion to  
withdraw contained the following admonition to plaintiff:

Because plaintiff is an LLC it can only litigate  
this action through counsel; it cannot proceed pro se.  
Lattanzio v. COMTA, 481 F.3d 137, 140 (2d Cir. 2007)  
(per curiam) ("[A] limited liability company . . . may  
appear in federal court only through a licensed attor-  
ney."); accord City of New York v. Mickalis Pawn Shop,  
LLC, 645 F.3d 114, 130-31 (2d Cir. 2011). Plaintiff  
must, therefore, retain new counsel in order to prose-

cute this action. If plaintiff fails to retain new counsel on or before May 17, 2013, it is my intention to issue a report and recommendation recommending that this matter be dismissed for failure to prosecute.

Outgoing counsel are directed to provide a copy of this Order to plaintiff and to explain plaintiff's obligation to retain new counsel if it wishes to prosecute this matter.

(Endorsement dated April 2, 2013 (Docket Item 20) (emphasis in original)).

On or about May 17, 2013, I received a request from plaintiff for additional time to retain counsel, and I granted that request with the following endorsed Order:

Plaintiff's time to retain new counsel is extended to June 19, 2013. If plaintiff fails to retain new counsel on or before June 19, 2013, it is my intention to issue a report and recommendation recommending that this matter be dismissed for failure to prosecute.

**NO FURTHER EXTENSIONS.**

(Endorsement dated May 19, 2013 (Docket Item 23) (emphasis in original)).

To date, no attorney has entered an appearance on behalf of plaintiff, nor has plaintiff contacted my chambers to request more time to retain an attorney.

As the authorities cited in my April 2, 2013 Endorsement teach, an LLC, such as plaintiff, can only appear in an action through counsel. Plaintiff has had more than two and one-half months to retain new counsel and has neither retained new

counsel nor sought additional time to do so. Plaintiff has also been explicitly warned of the consequence that will follow from its failure to retain new counsel. Accordingly, I respectfully recommend that the complaint in this matter be dismissed for failure to prosecute. Premier Florida Auto Sales & Leasing v. Mercedes-Benz of Massapequa, LLP, 10-CV-4428 (DRH) (WDW), 2012 WL 7149418 at \*1 (E.D.N.Y. Nov. 5, 2012) (Report & Recommendation), adopted at, 2013 WL 593506 (E.D.N.Y. Feb 14, 2013); Argentto Systems, Inc. v. Earthbound LLC, 10 Civ. 6724 (CM), 2012 WL 2829583 at \*1 (S.D.N.Y. July 9, 2012) (McMahon, D.J.); V.D.B. Pacific B.V. v. Chassman, 09 Civ. 8081 (KBF) (DCF), 2011 WL 6780601 at \*1 (S.D.N.Y. Dec. 20, 2011) (Forrest, D.J.); Bay Chevrolet, Inc. v. General Motors Corp., 08-CV-233, 08-CV-4631 (KAM) (JMA), 2011 WL 4628743 (E.D.N.Y. Aug. 11, 2011) (Report & Recommendation), adopted at, 2011 WL 4628713 (E.D.N.Y. Oct. 3, 2011); Streetbrains.com, LLC v. Lyriss, Inc., 09 Civ. 1980 (SAS), 2011 WL 1483967 at \*2 (S.D.N.Y. Apr. 18, 2011) (Scheindlin, D.J.).

#### OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(c)) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from receipt of this Report to file written

objections. See also Fed. R. Civ. P. 6(a). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Katherine Polk Failla, United States District Judge, 40 Centre Street, Room 2103, New York, New York 10007 and to the Chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Failla. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); United States v. Male Juvenile, 121 F.3d 34, 38 (2d Cir. 1997); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. CanadairLtd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-238 (2d Cir. 1983).

Dated: New York, New York  
June 26, 2013

SO ORDERED

  
HENRY PITMAN  
United States Magistrate Judge

Copies transmitted to:

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